Filed 3/15/10 Gellerman v. Aldrich CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

BRUCE GELLERMAN, et. al., Plaintiffs and Respondents, v. FOREST E. ALDRICH, Defendant and Appellant.	H033999 (Monterey County Super. Ct. No. M83277)

Defendant Forest Aldrich appeals from a judgment entered in favor of the plaintiffs, Bruce and Bonnie Gellerman, which prohibited Aldrich from interfering with an easement that provides access to the Gellermans' property. Aldrich contends that the trial court erred in failing to find that the easement had been extinguished by adverse possession. He further challenges the court's award of compensatory damages in the form of litigation costs, including expert and attorney fees, which the Gellermans had incurred in prosecuting their complaint and defending against Aldrich's cross-complaint. Finally, he contends that the court should not have ordered him to pay punitive damages, because there was no evidence of despicable or oppressive conduct or evidence of his wealth. We find error in the damages award and for that reason must reverse.

Background

The easement at issue pertains to a road that crosses property owned by Aldrich and two other neighbors, Donna J. McGregor and Carmelita Alexander. The property

benefited, the dominant tenement, is owned by the Gellermans.[1] The easement was granted to previous owners in a deed recorded in January 1961. The Gellermans' property would be landlocked but for the easement.

On February 27, 2007, the Gellermans filed a complaint against Aldrich and McGregor, asserting interference with their easement and seeking quiet title to the easement, declaratory relief, and an injunction prohibiting further interference. Aldrich responded with a suit for quiet title, naming the Gellermans and Alexander as cross-defendants and asserting abandonment of the easement and adverse possession.[2]

Several witnesses testified at the ensuing court trial. Joe Gerber was the brother of Walter Gerber, who owned the dominant tenement before deeding it to the Gerbers' nephew, Gary Gellerman in 1994. In 1998 Gary Gellerman transferred the property to his brother, Bruce Gellerman, and Bruce's wife, Bonnie. Joe Gerber recalled riding up to the property in the 1960s with Walter, who put a trailer there. Sometime between 1978 and 1982 Ray Berta was hired to clear and grade the existing road (which was then overgrown with brush) up to where Walter Gerber had installed a building pad. The road was then available to vehicles, but in 1983 a washout on the road caused damage to the Aldrich property, and after that the road was not drivable.

Bruce Gellerman recalled walking along the road in 1994 and thereafter "at least once but most [of] the time twice and three times a year." Despite the washout he was able to walk on the property. At some point a gate was placed on the McGregor property, but he was always able to pass around it, so it did not bother him. In addition, during one

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[1] The Gellerman and Alexander properties were once a single parcel owned by Bruce Gellerman's uncle, Walter Berger, who in 1972 subdivided it into two parcels, both benefiting from the easement. McGregor, the owner of the second parcel, was a defendant in the Gellermans' action and filed a cross-complaint for quiet title. She has not participated in this appeal.

[2] Aldrich later dismissed without prejudice the second cause of action for abandonment.

of his visits in 2002 he noticed a storage container on the McGregor property. Michael Maiorana, a land title research analyst hired by Gellerman in 2006, testified that it was easy to walk around the 20-foot container. Nevertheless, Gellerman asked the former owner of the McGregor parcel to remove the container. He received a "very rude" negative response. On another occasion Gellerman saw a locked pipe across the road where the storage container was later placed, but one could easily step over the pipe to pass, as it was only two feet off the ground. In 2006 he first saw a wire fence which prohibited access over the easement. In 2007 the wire fence, which Aldrich had placed there, was cut to permit a property inspection.

Julie Lang, Aldrich's mother, lived on the Aldrich property from 1973 until 1997. She testified that a gate was installed by Russell Murray, a predecessor of McGregor, in 1985. Murray had told her that the gate would be locked and that no one would be permitted to use the road. After that, as she recalled, she did not see anyone on that road, with the exception of some hikers who became lost in the area. Lang first met Bruce Gellerman in 1995 after another slide, but she did not see him after that. Lang did not recall any obstructions to the easement while she lived there other than Murray's gate in 1982, and a truck and chipper Murray would park there.

Bradley Joseph Lang lived on the property from 1978 to 1997. He recalled Murray's equipment, his horses, and the gate, but no other obstructions. He had walked on the easement a couple of times but had "no real reason" to do so.

Aldrich, who had lived on his property almost continuously since his birth in 1973, testified that between 1997 and 2002 he did not see anyone using the easement across his property. In addition to the container and Murray's equipment, there was a fence that he put up in 2006 after he saw surveyors on his property and "commanded them to leave." Aldrich further stated that in the summer of 1995 he put a no-trespassing sign on a redwood post, and in 1997 he placed a lightweight chain across the road "to designate where my property begins" so that his neighbor, Murray's successor, "knew the

difference." The chain was removed "[a]round 2000 range," when the container was placed there.

The trial court found no extinguishment by adverse possession. What made the road impassable was the washout, a natural phenomenon, which did not lead to any change in the parties' rights to the road. The court inferred from the evidence that the owners of the McGregor and Aldrich parcels were aware of the easement and were concerned that the Gellerman property might be developed and a more useful road put in there. Consequently, "they made some attempts to prevent that from happening." However, none of these measures had prevented Bruce Gellerman from using the easement. Noting the fence Aldrich had constructed, the court pointed out that although it was an adverse use, it existed less than five years before the Gellermans filed their complaint.

The court therefore granted an injunction prohibiting Aldrich and McGregor from interfering with plaintiffs' use of the easement. Aldrich was ordered to remove the fence, and McGregor was ordered to remove the storage container and concrete pillars at the gate on her property, thereby providing the Gellermans complete access through the gate. Addressing the Alexander property, the court granted a quiet title judgment for Aldrich and McGregor, finding no easement in her favor.

The court further found clear and convincing evidence that when the Gellermans were attempting to have the area surveyed, Aldrich engaged in conduct that was "oppressive and interfering with use of the easement," which entitled the Gellermans to punitive damages. The court found it difficult to measure the damages for such conduct. During that time the Gellermans had been seeking a buyer for their property, but the court was "not sure" that their realtor's testimony about its reduced value "would necessarily translate into the correct measure for damages." The court instead ordered Aldrich to pay general and punitive damages in "an amount equal to all costs incurred by plaintiffs in connection with the cost of proving plaintiffs' easement and defending against . . . [the]

claims of extinguishment," including attorney fees. That amount, eventually determined to be $78,659.62, was awarded to the Gellermans in a judgment entered February 26, 2009.

Discussion

On appeal, Aldrich challenges both the legal and factual underpinnings of the judgment. First, he argues, the court erred in basing its evaluation of the evidence on the assumption that extinguishment of an easement by adverse possession requires a permanent obstruction of the easement holder's access. He further contests the sufficiency of the evidence supporting the court's finding that adverse possession had not occurred. Finally Aldrich contends that the damages award was legally and factually unjustified. We consider each argument in turn.

1. Extinguishment of an Easement by Adverse Possession

A right of way, such as the road in dispute here, "is primarily a privilege to pass over another's land. It does not exist as a natural right, but must be created by a grant or by its equivalent. Such rights of way may be either public or private." (*Alameda County v. Ross* (1939) 32 Cal.App.2d 135, 143.) Notwithstanding such a grant, the owner of the servient tenement (in this case, Aldrich) may use the burdened land in any way that "does not interfere unreasonably" with the easement. (*City of Pasadena v. California-Michigan Land & Water Co.* (1941) 17 Cal.2d 576, 579; see also *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 767.)

"It is well settled that an easement, regardless of whether it was created by grant or use, may be extinguished by the owner of the servient tenement upon which the easement is a burden, by adverse possession thereof by the servient tenement owner for the required statutory period. Perhaps more accurately stated an easement may be extinguished by the user of the servient tenement in a manner adverse to the exercise of the easement, for the period required to give title to land by adverse possession." (*Glatts v. Henson* (1948) 31 Cal.2d 368, 370-371; see also *Sevier v. Locher* (1990) 222

Cal.App.3d 1082, 1084 ["easement obtained by grant may be extinguished by adverse possession by the owner of the servient tenement"].) The applicable period is five years. (Code Civ. Proc., § 325.)

Thus, "a court may conclude that an easement has been extinguished where the owner of the servient tenement, under an adverse claim of right, with notice thereof to the owner of the dominant tenement, continuously during a period of five years, uses the servient tenement in such a manner as to obstruct its use for easement purposes by the latter owner." (*Ross v. Lawrence* (1963) 219 Cal.App.2d 229, 232.)

"Ordinarily the issues thus presented are questions of fact determinable upon a consideration of all of the circumstances and the inferences reasonably deducible therefrom." (*Ross v. Lawrence, supra,* 219 Cal.App.2d at p. 232; accord, *Masin v. La Marche* (1982) 136 Cal.App.3d 687, 693.) "For the trial court the question is whether the circumstances proven do or do not justify an inference showing the required elements. In the appellate court the issue is merely whether there is sufficient evidence to support the judgment of the trial court." (*O'Banion v. Borba* (1948) 32 Cal.2d 145, 149-150.) We therefore review those factual questions under the substantial evidence standard. (*Sevier v. Locher, supra,* 222 Cal.App.3d at p. 1087.) The evidence must be viewed in a light most favorable to the judgment and all conflicts must be resolved in favor of the prevailing party. If there is any substantial evidence to support the judgment, it must be affirmed. (*Zimmer v. Dykstra* (1974) 39 Cal.App.3d 422, 431.)

In this case Aldrich assigns judicial error in two respects: first, that the trial court incorrectly required an obstruction of an easement to be permanent in order to extinguish it; and second, that insufficient evidence supports the finding that the easement was not extinguished by adverse possession. The record does not support either argument.

The court did use the word "permanent" several times in attempting to explain to counsel that no one had used the servient tenement adversely so as to extinguish the easement. First, the court noted the hostile environment caused by the condition of the

land itself; it was not the attitude of Aldrich or the ineffectual acts of Russell Murray (McGregor's predecessor) that restricted access to the Gellermans' property.[3] "I think there's a distinction that the law should make in a situation of this sort between use of the land that is hostile to the dominant [tenement] owner's right to use . . . the easement through that servient tenement. The use of the land prevents the use of the easement, and that's what's hostile or adverse. Just being nasty neighbors and having an attitude toward your neighbors and trying to stop them and treat them in a . . . verbally threatening fashion and hostilities of that sort, it's just conduct and behavior that I don't think should ever give rise to adverse possession of an easement when it's otherwise not – there's not permanent structures being put on the easement. There's not a use of the land that the easement runs across that prohibits the dominant ten[ement] owner's use of the land. I just don't see the law supporting the concept that by basically being a hostile and aggressive neighbor and being threatening when somebody is trying to walk lawfully across the easement that alone should be the basis for an adverse possession claim."

Aldrich does not take exception to subsequent comments referring to permanency, but for the sake of completeness, we describe those as well. In reference to the testimony of Julie Lang, Aldrich's mother, the court stated, "So I also don't find [Julie Lang's] specificity and knowledge about the activities [of Murray] and how long they endured and how permanent they were in nature to be enough to establish sufficient evidence." Then, in correcting defense counsel's misunderstanding of its reasoning, the court explained, "Mr. Gellerman never felt the need to use a vehicle to get to his property, because he didn't have a graded road that he could utilize, and there was a slip out. So

[3] The element of hostility necessary for adverse possession "means not that the parties must have a dispute as to the title during the period of possession, but that the claimant's possession must be adverse to the record owner, 'unaccompanied by any recognition, express or inferable from the circumstances of the right in the latter.' [Citation.]" (*Sorensen v. Costa* (1948) 32 Cal.2d 453, 459.)

the fact that there were some obstructions that may have been temporary in nature and not permanent I don't think Ms. Lang was sufficient to satisfy me by a preponderance that they were so permanent in nature as to be an obstruction of the sort to extinguish an easement." Responding again to defense counsel's argument, the court further stated, "When the blockage is temporary and transient in nature, as was described by the testimony. I mean, a piece of equipment can be moved over to another location, just like the storage container can be moved to another location easily enough. And it's true there's cases that talk about that kind of situation in different ways." In this context the court took note of *Reichardt v. Hoffman, supra*, 52 Cal.App.4th at page 768, where this court reversed a judgment extinguishing an easement "in the absence of evidence" of a "physical change which created a *permanent* and material interference which was *incompatible* with use of the easement." The interference with the dominant tenement holder's use of the easement "must be material and permanent rather than occasional and temporary in order to justify extinguishment." (*Ibid*.)[4]

Finally, the court again corrected defense counsel's misunderstanding regarding the effect of a natural slipout. Aldrich's attorney maintained that the court's ruling "set[] the rules of adverse possession aside, because you can't get adverse possession where the road has slipped out so they don't want to use it; therefore, your blocking it is not hostile because of the slip out." The court replied, "Well, I don't think that my ruling goes in that direction. It – what I'm looking at is Mr. Gellerman's perspective, in terms of whether this was hostile, adverse to him, or whether it was something he was by implication

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[4] In *Reichardt* it was the dominant tenement owner who interfered with the plaintiffs' use of their servient tenement, insisting that the plaintiffs and their guests stay off his easement and intimidating prospective buyers of the plaintiffs' property. The basis of the trial court's erroneous ruling there was not abandonment, as Aldrich represents, but the defendant's interference with the plaintiffs' "comfortable enjoyment" of the servient tenement. (*Id*. at p. 762.) This court likewise did not rely on the principle of abandonment in its rejection of the trial court's analysis.

giving a license or right to do. . . . [I]n the situation which he used the easement and the other obstacles for vehicle traffic, these were not an obstruction to his use of the easement."

The court did not find an insufficient showing of adverse possession based on an assumption that a permanent structure was required to meet the claimant's burden of proof. The point of the court's comments at the hearing was that if the acts of the servient tenement holder did not actually preclude the use of the easement, they were insufficient to constitute adverse possession. It would be different, the court suggested, if, for example, someone had erected a building that made paving the road impossible. But Aldrich's conduct was "mainly just putting up a barrier and being very aggressive about keeping everybody out, including Mr. Gellerman." Referring to the "very vague" testimony of Aldrich's mother, the court noted that just because Julie Lang had not seen people using the path "doesn't mean that . . . Mr. Gellerman wasn't walking by on a given day to access his land when she didn't see that." Lang's description of Russell Murray's activities was also insufficient, the court ruled, because Bruce Gellerman remained able to use the easement to visit his land. Then, correcting Aldrich's impression of the court's ruling, the court clarified that the inability to use the road by vehicle was immaterial. The statement of decision reflects the court's point of view merely by pointing out that the storage container on McGregor's property, like the parking of tractors or other equipment, was only "a transitory use, at best, and also did not exist for a continuous period of five years prior to the bringing of plaintiffs' complaint." We thus conclude that the court's references to permanency were merely comparative illustrations of how an adverse use of a property right could have been made. Here, no acts by defendants or their predecessors was shown to have obstructed the Gellermans' use of the easement to the extent permitted by the natural condition of the road.

2. Sufficiency of the Evidence

Aldrich next contends that the evidence "dictates a finding of an adverse possession of the easement. Put another way, there is no substantial evidence to support the Trial Court's determination." We disagree.

A party claiming extinguishment of an easement by adverse possession must present sufficient evidence from which the trier of fact can conclude that the claimant's use was continuous, uninterrupted, peaceable, adverse and under a claim of right. (*O'Banion v. Borba*, *supra*, 32 Cal.2d at p. 150.) "Moreover, '[a]n easement cannot be acquired or extinguished by adverse use unless the party whose rights are affected thereby has knowledge of the adverse nature of such use. This knowledge may be either actual or constructive, resulting from notice either express or implied.' [Citation.]" (*Gerhard v. Stephens* (1968) 68 Cal.2d 864, 903.)

Aldrich emphasizes that Bruce Gellerman had notice of the adverse use of the road because he was aware of the gate, storage container, chain, and other obstructions on the road at various times. He places particular reliance on the pipe and chain he placed there in 1997 to designate where his property began. But Aldrich himself testified that the chain was removed "around 2000," and Bruce Gellerman testified that the contraption could easily be stepped over, as it was only two feet off the ground. Likewise, Gellerman was not bothered by the gate, as he could walk around it. He did object to the gate later, however, as the distance between the concrete pillars was insufficient for fire trucks to pass through. The storage container was put there in either 2000 or 2002, but there was still room to walk around it.

Aldrich places undue weight on the fact that the easement was not usable by vehicle, a circumstance he attributes to the obstacles placed there by him and by the prior owners of the McGregor parcel. The trial court discounted this factor, because the road was still passable on foot. Vehicle access had already been precluded by the natural conditions of the property. Thus, because the Gellermans remained able to use their

easement—and did so on occasion each year— the objects in their path were not sufficiently adverse to meet that element of adverse possession. The only exception was Aldrich's fence, but that was erected in 2006, only a year before plaintiffs brought suit. Thus, on the record before us, we conclude that substantial evidence supports the court's finding that adverse possession had not been proved.

3. Damages

The determination and allocation of damages is a matter consigned to the trial court's sound discretion, within the bounds of the due process clause[5] and this state's disfavor of awards resulting from passion and prejudice. (See, e.g., *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 927.) "[I]in our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. [Citation.] Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.' [Citations.] By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution." (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416 [123 S.Ct. 1513].)

Aldrich contends that the $78,659.62 damages award cannot be sustained because (1) it was unauthorized to the extent it was for compensatory damages and (2) as a measure of punitive damages, the award was not supported by evidence of his wealth or of oppressive or despicable conduct. It is not clear how much of the eventual damages award here consisted of a punitive component, as the entire award was denominated as

[5] Aldrich does not assert any due process violation resulting from excessive punitive damages, and the court did not make any specific findings regarding the amount designated as punitive. In any event, in light of our disposition we have no occasion to decide whether the award violated due process.

general and punitive damages without segregation.[6] Nevertheless, we first address the award to the extent that it is compensatory in nature, because the amount properly attributed to punishment and deterrence is dependent in part on the compensatory component. We find merit in Aldrich's contention that attorney and expert fees were not permitted as compensatory damages.

The firmly established "American rule," codified in Code of Civil Procedure section 1021, "requires both winners and losers to bear their own legal fees in . . . all litigation," unless a statute or agreement states otherwise. (*Covenant Mutual Ins. Co. v. Young* (1986) 179 Cal.App.3d 318, 321; see also *Davis v. Air Technical Industries, Inc.* (1978) 22 Cal.3d 1, 5.) Notwithstanding the broad language of Civil Code section 3333, on which the Gellermans rely, Code of Civil Procedure section 1021 "undoubtedly prohibits the allowance of attorney fees against a defendant in an ordinary two-party lawsuit." (*Prentice v. North Am. Title Guaranty Corp.* (1963) 59 Cal.2d 618, 620; see also *Pederson v. Kennedy* (1982) 128 Cal.App.3d 976, 979.) No statute authorizes attorney fees directly against the tortfeasor in an action to preserve an easement and prohibit interference.

This is not a case involving the tort of another; thus, the Gellermans' reliance on *Prentice v. North Am. Title Guaranty Corp.*, *supra*, 59 Cal.2d at page 620 is misplaced. (See also *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 78 [tort-of-another doctrine does not permit recovery of the fees involved in litigating directly with negligent defendant].) Nor is this a case of insurance bad faith, false arrest, or

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[6] We note that our Supreme Court long ago criticized the practice of awarding damages without indicating how the total amount is divided into compensatory and punitive elements. "We can see no justification for this practice in a case wherein damages of both varieties are sought, and we herewith disapprove it. In most cases the use of such a form would make review of questions of excessive damages next to impossible for both the trial court on a motion for new trial and an appellate court on appeal." (*Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal.3d at p. 927.)

malicious prosecution. (See *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 818; see also *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 505 [noting "benefit" exceptions to American rule].) Even where a fiduciary is the wrongdoer, the general rule holds, because "surely, if the award of attorney fees depended on the nature of the wrong, fees in tort actions would be awarded on a case-by-case basis, a result clearly prohibited by section 1021." (*Gray v. Don Miller & Associates, Inc, supra,* 35 Cal.3d at p. 507.)

As no applicable exception to Code of Civil Procedure section 1021 is presented here, the plaintiffs' attorney fees were not recoverable. Characterizing the fees as damages does not allow a plaintiff to avoid this procedural bar. Likewise, recovery of expert witness fees is precluded by Code of Civil Procedure section 1033.5, which permits such costs only if the expert's appearance was ordered by the court. Plaintiffs have cited no authority altering this rule when the expert fees are characterized as damages in ordinary two-party tort litigation.

Even when permitted to recover attorney fees as tort damages, those fees generally "may not be asserted by post-trial motion but rather must be pleaded and proved to the trier of fact." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 869, fn. 4; *Gorman, supra,* 178 Cal.App.4th at p.79.) As Aldrich pointed out below and on appeal, the Gellermans made their request for attorney fees by post-trial motion rather than during trial. This was not a proper case for an award of fees as compensatory damages.

"In California, as at common law, actual damages are an absolute predicate for an award of exemplary or punitive damages." (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147; *Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677). The court clearly intended to award both compensatory and punitive damages based on Aldrich's "oppressive and interfering" conduct, but it expressed "a little bit of difficulty with the measure of damages that might be appropriate for that conduct." The court was "not sure that the realtor's testimony about her opinion of value would necessarily translate into the

correct measure for damages, because I don't have clear evidence that there was a buyer at a certain price."

After expressing hesitation about the appropriate measure of damages, the court selected the entire cost of litigation, including attorney and expert fees. This was legal error, not a matter of insufficient evidence to support the court's factual findings. We therefore remand this matter for reconsideration of compensatory damages using a proper measure. If the court concludes that no diminution in property value or other evidence of injury has been shown, then the punitive damages award must be withdrawn as well. In the event, however, that damages are again granted to plaintiffs, we briefly address Aldrich's other objections to the punitive aspect of the award.

Punitive damages arising from tortious conduct are authorized "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." (Civ. Code, § 3294, subd. (a).) All he did, Aldrich points out, is construct a fence and order the surveyors off his property upon threat of a lawsuit. He rhetorically asks, "[h]ow is it any of these actions can be considered despicable? What testimony is there that shows these actions were taken in conscious disregard of Plaintiffs' rights?"

These were questions for the trial court as factfinder, not this court. The basis of the court's award was Aldrich's interference with the Gellermans' easement rights, which made it difficult to sell their property. Without the easement there was no access to the Gellermans' parcel. That Aldrich had at least constructive notice of the easement is supported by his admission at trial that during his acquisition of his property he read the entire title report "many times," along with his deed and the Gellermans' deed as well. Having heard the entire testimony from both sides, the court found clear and convincing evidence that Aldrich's conduct in barring the Gellermans, their agents and surveyors, and prospective purchasers was oppressive. There was substantial evidence at trial that over a period of 10 years Bruce Gellerman had "tried to negotiate with whoever owned the property" and had tried to "settle this out of court, to no avail."

Accordingly, in the circumstances presented here the court was entitled to find that Aldrich's conduct was oppressive. The trial court recognized that conduct that could give rise to adverse possession runs the risk of subjecting the person to liability for punitive damages. "If they manage to obtain adverse possession, they may get a pass on having caused damage if that's all there is. But . . . [i]f you're engaging in borderline tortious, maybe even criminal conduct in order to threaten your neighbor to not feel comfortable walking across their easement, I think you're being . . . particularly risky, because . . . it is conduct that can subject you to punitive damage liability or other liability."

Proving oppressive conduct, however, does not alone justify an award of punitive damages. "[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." (*State Farm Mut. Auto. Ins. Co. v. Campbell, supra,* 538 U.S. 408 at p. 426; see also *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172-1175.) Upon remand, the questions of reasonableness and proportionality will be a matter for the trial court's exercise of discretion should it again order compensatory damages.

Finally, we briefly address Aldrich's contention that punitive damages were unjustified without either a finding or evidence of his wealth. The trial court raised the question of Aldrich's wealth in considering the overall question of damages. While expressing doubt about plaintiffs' suggested measure based on an opinion of value from plaintiffs' realtor, the court observed that a determination regarding punitive damages might require "further evidence and allowing of discovery into his wealth, because that has to be considered also."[7] The court does not appear to have revisited the issue, however.

[7] The court suggested that "the cost of clearing title may be the measure of punitive damages more appropriately," but without additional evidence of Aldrich's wealth, the amount was uncertain.

Aldrich correctly argues that evidence on this question was necessary. (*Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 46; cf. *Adams v. Murakami* (1991) 54 Cal.3d 105, 117 [without consideration of a defendant's financial condition, courts cannot make an informed decision whether a particular award is " 'greater than reasonably necessary' "].) In asserting otherwise, the Gellermans misunderstand the holding of *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 582-583, where the court rejected only the defendant's reliance on net worth as the sole measure of its ability to pay. It is the plaintiff's affirmative burden to produce evidence on this question. (*Adams v. Murakami*, *supra*, 54 Cal.3d at p. 120.) We decline to evaluate the evidentiary basis for any factual conclusion on this question, as it is a matter for the trial court in the first instance.

Disposition

The judgment is reversed, and the matter is remanded for the sole purpose of reconsidering damages. In the interests of justice, the parties shall bear their own costs for this appeal.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.